In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-953

CHARLES BEN HOWELL,

Petitioner,

v.

CLARENCE JONES, Sheriff,
Dallas County, Texas,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JOHN H. HAGLER
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
(214) 749-8511

Attorneys for Respondent.

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This Brief in reply to the Petition for Certiorari is respectfully submitted on behalf of the Respondent Clarence Jones, Sheriff of Dallas County, Texas.

STATEMENT OF THE CASE

Charles Ben Howell, a Texas lawyer, appeals two State court convictions for contempt. The first contempt citation resulted when Howell, acting as the attorney in a divorce case, failed to disclose to the trial judge the existence of an important collateral legal proceeding, even though directly questioned by the trial judge. The second contempt citation

came during the hearing on the first contempt charge when Howell, as a witness testifying in support of a Motion for Continuance, refused to answer a question on cross-examination, even though directly ordered to do so by the judge.

More specifically, the record shows that Howell represented a woman client in a divorce and child custody proceeding. Howell sought a default judgment because the husband's attorney had not filed an answer. Prior to the granting of the default judgment, the trial judge (Judge Dee Brown Walker) asked Howell: "I wonder why Gerry (i.e. the husband's attorney)[1] didn't file an answer." Howell replied: "That we don't know." (J.A. 87).[2] The trial judge next asked Howell: "Have you talked to Gerry about the case?" Howell responded: "I have called Mr. Copeland's (sic) office several times and haven't gotten a response." (J.A. 87). Finally, the judge asked: "But, you haven't ever received an answer from him, umm?" Howell answered: "No." (J.A. 87). The trial judge then granted the default judgment.

However, the record reveals that another lawsuit involving the same parties and subject matter was pending in a neighboring court. In fact, Howell and the husband's attorney had appeared in that court just two days prior to the granting of the default judgment in Judge Walker's court. (J.A. 94). At that time, the pending lawsuit was re-set for approximately one week. A hearing on the custody of the children was to be held on this later date. Two days later,

1 Explanatory portion added by Respondent.

2 For uniformity, the Respondent has adopted the Petitioner's method of record designation; (J.A.) refers to the Joint Appendix filed with the Clerk of the Fifth Circuit, U.S. Court of Appeals.

however, Howell obtained the default judgment in Judge Walker's court. (J.A. 100). The default judgment included an order that awarded custody of the children to Howell's client. (J.A. 105).

Upon learning the true facts, Judge Walker set aside the default judgment and cited Howell for contempt. Later, at the contempt hearing, Howell was asked: "You don't consider that (i.e. the failure to disclose the other lawsuit)[3] concealing material facts from Judge Walker?" Howell answered: "I consider that the law is an adversary proceeding, sir, and that I wasn't obligated to disclose any special defenses that the Defendant possessed." (J.A. 100).

Judge Lewis Holland presided over the contempt hearing. In support of a Motion for Continuance, Howell testified that he was unable to retain qualified counsel, even though he had talked with "no less than four lawyers," all of whom had declined to represent him. (J.A. 41). However, on cross-examination, Howell refused to disclose the names of the four lawyers. (J.A. 41). Even when the court instructed Howell to answer, he refused. (J.A. 42). Accordingly, Howell was held in direct contempt of court and punishment was assessed at $500 and thirty days in jail. At the conclusion of the hearing, the court found Howell guilty of contempt for his conduct at the default judgment proceeding and assessed punishment at $100 and three days in jail.

The Texas Court of Criminal Appeals upheld the orders of contempt. *Ex parte Howell*, 488 S.W.2d 123 (Tex. Crim.

3 Explanatory portion added by Respondent.

App. 1972). The Petitioner then appealed the case directly to this Court pursuant to 28 U.S.C. Sec. 1257(2). This Court dismissed the appeal "for want of a substantial federal question." *Howell v. Jones,* 414 U.S. 803, 94 S.Ct. 114, 38 L.Ed. 2d 38 (1973). The Petitioner next filed a habeas corpus petition in the U.S. District Court. The writ was denied. (J.A. 313-315). Such denial was, in turn, affirmed by the U.S. Court of Appeals. *Howell v. Jones,* 516 F.2d 53 (5th Cir. 1975). Again, this Court has been petitioned.

ARGUMENTS

I.

THE PETITIONER RECEIVED A FAIR TRIAL BEFORE AN IMPARTIAL TRIBUNAL.

[In Reply to Petitioner's Question One]

The Petitioner complains that he was denied a fair trial before an impartial tribunal because of ex parte communications between Judge Walker and Judge Holland. Judge Holland presided over the contempt hearing. The record, however, does not support the Petitioner's contention.

Prior to the contempt hearing, the two judges met to discuss the effects of the new Texas contempt statute (Article 1911a, Tex. Rev. Civ. Stat. Ann.). This statute was newly enacted and the conversation between the two judges merely concerned the interpretation of the new statute. (J.A. 279-280). In addition, Judge Walker sent Judge Holland a letter that further interpreted the statute. (J.A. 260). These communications, however, did not concern the actual facts surrounding the contemptuous conduct. As stated in *United States*

v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed. 2d 778 (1966):

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

In the present case, the record reflects that Judge Holland's ruling was based solely on the testimony adduced at the contempt hearing. (J.A. 276).

Finally, assuming arguendo that the above-mentioned communications disqualified Judge Holland from ruling on the original contempt citation, nevertheless such communications did not affect the second contempt conviction. The Petitioner's refusal to comply with Judge Holland's direct instructions was unaffected by such communications.

II.

THE TEXAS CONTEMPT STATUTE IS CONSTITUTIONAL.

[In Reply to Petitioner's Questions Two, Three and Four]

The Petitioner next challenges the constitutionality of the Texas contempt statute (Article 1911a, Tex. Rev. Civ. Stat. Ann.). The Petitioner attacks this statute on seven grounds. However, these identical grounds were previously presented to this Court by way of appeal. (J.A. 218-230). In *Howell v. Jones,* 414 U.S. 803, 94 S.Ct. 114, 38 L.Ed. 2d 38 (1973), this Court dismisstd such appeal "for want of a substantial federal question." Such disposition was an adjudication on the merits. *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, S.Ct. 978, 3 L.Ed. 2d 1200 (1959). Furthermore, that adjudication was

conclusive as to the issues now raised. See 28 U.S.C. Sec. 2244(c).

CONCLUSION

It is therefore respectfully submitted that this Court should deny the application for writ of certiorari.

Respectfully submitted,

HENRY WADE
Criminal District Attorney
Dallas County, Texas

JOHN H. HAGLER
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
(214) 749-8511

Attorneys for Respondent.

CERTIFICATE OF SERVICE

I, John H. Hagler, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Respondent's Brief on counsels for Petitioner, by depositing three copies of the said Brief in the U.S. Mail, First Class Postage Prepaid, on this the 29th day of January, 1976, addressed to H. Averil Sweitzer, 226 Lakewood Tower, Dallas, Texas 75214, and Howard D. Pattison, 105 S. Prairieville Street, Athens, Texas 75751, as counsels of record for Petitioner.

John H. Hagler
John H. Hagler